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No. 01-809

In The

Supreme Court of the United States

Supreme Court, U.S.
FILED
DEC 3 2001
CLERK

LEAH E. MCKENZIE,

Petitioner,

v.

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Washington

PETITION FOR WRIT OF CERTIORARI

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SEQ 115 JOB 11113IN4- 000-02 PAGE-001 KEEFE
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QUESTIONS PRESENTED

- Whether the Washington Supreme Court, in refusing to permit petitioner's appeal from a personal injury trial in accordance with the opinion of the Court of Appeals that a record is not required when a court reviews arbitration trial proceedings under state law, and that the lack of a recorded transcript is irrelevant in these proceedings, has deprived petitioner of the due process and equal protection of the laws guaranteed by the Fourteenth Amendment?

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PARTIES TO PROCEEDINGS

The following list identifies all parties to the proceedings in the Washington Supreme Court:

Leah E. McKenzie
Mutual of Enumclaw Insurance Company

RULE 29.4

Pursuant to Rule 29.4(c) of the Rules of this Court, because this petition involves the constitutionality of a state statute, and neither the State of Washington nor any agency, officer, or employee thereof is a party, this petition is being served on the Attorney General of Washington.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Leah McKenzie, whose appeal in a personal injury trial was finally terminated by the state courts without a record, hereby petitions for a writ of certiorari to review the judgment of the Supreme court of Washington, which refused to permit her appeal in accordance with the opinion of the Court of Appeals that a record is not required when a court reviews arbitration trial proceedings under state law, and that the lack of a recorded transcript is irrelevant in these proceedings. The Washington Supreme Court denied the appeal despite her arguments of error and constitutional infirmity in the application of state law as the basis for dismissing the appeal, and over her arguments under controlling state decisions which conflict with the result, and moreover, which have integrated the principles of this Court's equal protection and due process cases, and which have unshakably held that a trial record is required in order to assure a complete judicial review.

OPINIONS BELOW

The September 5, 2001, order of the Supreme Court of Washington dismissing the petitioner's appeal is unreported and is reproduced in the appendix to this petition. (Petitioner's Appendix B, pg. 1). The related February 12, 2001, decision of the Court of Appeals, Division I, State of Washington, is unreported and is reproduced in Pet. App. A, 1-7. The orders of the King County Superior Court are reproduced at Pet. App. C, 1-2.

JURISDICTION

The judgment of the Supreme Court of Washington dismissing the petitioner's appeal was entered on September 5, 2001. (Pet. App. B, 1). This Court has jurisdiction under 28 U.S.C. Section 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, which provides in relevant part as follows:

Amendment XIV:

. . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Introduction. This is a case involving personal injuries arising from an automobile accident near Snoqualmie Pass, Washington, in April 1995. The primary insurer, PEMCO Insurance Co., settled for the policy limits ($50,000) of its insured's policy on May 15, 1998.

Arbitration proceedings with Mutual of Enumclaw, the UIM insurer, arising out of the action with PEMCO, were then brought under RCW ("Revised Code Washington") 7.04, *et seq.* The arbitration concluded in trial proceedings between Ms. McKenzie and Mutual of Enumclaw in Seattle in June 1999, and resulted in an award of $59,190 on June 18, 1999. (CP 11). The decision does not reflect that the proceedings were reported or recorded electronically or by other means. The evidence shows that a record of the trial proceedings does not exist.

A notice of appeal and a motion to vacate the arbitration award were filed by Ms. McKenzie in the Superior

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Court on statutory and constitutional grounds in September 1999 for lack of a verbatim record of the proceedings. On October 22, 1999, the trial court denied her motion to vacate the award. (CP 266-267). On November 22, 1999, a timely notice of appeal was filed. (CP 268-70).

Background. Petitioner has lived in Washington state most of her life. At the time of the accident, she was a sophomore at Central Washington State University in Ellensburg, Washington. She now lives in Seattle, Washington. (CP 199). Information provided by petitioner to the insurers in this case establishes that she has had no previous injuries or long lasting or serious illnesses prior to this accident. (CP 172-73).

The accident occurred on April 14, 1995, at about 1:10 p.m. between Easton Road and Cabin Creek near Snoqualmie Pass, Washington. Ms. McKenzie was a passenger in an automobile driven by a friend, and their vehicle was traveling toward Snoqualmie Pass when it was hit by another vehicle. There was snow and ice on the road at the time the accident occurred. The collision caused their vehicle to spin out of control, and flipped their car over from bumper to bumper on its top. According to the police report, PEMCO's insured was cited by an officer at the scene for an unsafe lane change. (CP 20-21; CP 174-75).

Ms. McKenzie and her friend were subsequently taken by ambulance to the hospital and emergency room at Cle Elum, Washington. Subsequent examinations and treatments for Ms. McKenzie in Ellensburg, Washington, between May and August 1995, and in Stockton, California in November 1995, established a misalignment of the vertebrae in her cervical and lumbar spine as a result of the accident. According to her doctor in Stockton, there

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was a misplacement of the vertebrae in her cervical spine, and in the lumbar in her lower back, which resulted in a pelvic imbalance and a 1½" difference in hip alignment. His entrance report for petitioner documents: 1) low back pain, sharp bilateral pain, and increased pain with motion; 2) neck pain, bilateral sharp and dull pains, radiating to the shoulder blades and head every other day. (CP 28-35; CP 37-38).

Ms. McKenzie re-located to Tehachapi, CA, where she began seeing John D. Kaufman, M.D., an orthopedic surgeon. Dr. Kaufman's report of August 12, 1996, documents intermittent pain and stiffness in the cervical spine, and a constant aching and occasional sharp pain in the lumbar spine below her beltline. According to Dr. Kaufman's report, the occurrence of sharp, stabbing pain radiates downward, worse on the right, and to the right lower extremity as far as the knee. The report also documents numbness in the right knee, and that her symptomatology is exacerbated with prolonged sitting, standing, walking, or exercising. (CP 53).

An MRI of the lumbar spine through University Medical Imaging Center revealed a herniated disc at L4-5 impinging on the nerve root. On Dr. Kaufman's advice, Ms. McKenzie began physical therapy with a cervical traction unit. (CP 57-60). His medical report of February 13, 1997, advises that lumbar surgery may be necessary, and that the cost of the surgery would be $10,000 to $15,000. (CP 66-68).

In February 1997, petitioner returned to Washington and began seeing Thomas DePuydt, M.D., at the Eastside Sports Medicine Clinic in Kirkland. The initial exam and consultation (April 1997) reports that she has no previous history of neck or back pain or injuries, and his report

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documents that she experiences constant back pain on a pain level of approximately 4 out of 10. The report states that about once a week, the pain flares to an intensity level of 7-8 out of 10. Dr. DePuydt also writes that she has intermittent radicular pain down the right leg to the surface of her foot. (CP 82-83; CP 211-15).

Dr. DePuydt then sent Ms. McKenzie to a physiatrist for epidural injections in the back to decompress the nerve root. Dr. DePuydt also recommended physical therapy. (CP 84). His report of May 30, 1997, writes that her MRI shows significant discogenic herniation in L4-5. (CP 86).

In July, Ms. McKenzie had her first fluoroscope exam and epidural injection from the physiatrist (CP 100), and she began physical therapy. (CP 111-13). The report from her physical therapist in September 1997, interprets the Lumbar Extension Static Test as showing that "this patient's strength is 50% below the age and gender based norms. Leah has continued to increase her dynamic exercise weight on a weekly basis. She is limited in forward flexion by 46%." (CP 121-26). Ms. McKenzie also received two more epidural injections in this period. (CP101-02).

An independent medical examination requested by Mutual of Enumclaw was conducted by Ted L. Rothstein, M.D., on April 14, 1999. Dr. Rothstein's examination relates that Ms. McKenzie experiences intermittent pain in the right paralumbar region of her back which is made worse with exertion or traveling, and that this is associated with stiffness and a sense of fatigue. Dr. Rothstein writes that she experiences sharp pains which radiate down the posterior aspect of both legs, right more so than left, and that this sometimes responds to treatment with Ibuprofen or Ultram. He also writes of parenthesis in

right lower back, and that since she received the epidural injections, she has experienced decreased sensation or parenthesis in the right lower thoracic and lumbar regions of her back. The independent medical examination concluded that her current physical findings including low back pain and numbness over the dorsum of the right foot are consistent with L5 radiculopathy. (CP 165-66).

Arbitration Proceedings. The primary insurer, PEMCO Insurance Co., settled for the policy limits of its insured's policy on May 15, 1998. (CP 258-260). Arbitration proceedings with Mutual of Enumclaw arising out of the Superior Court action with PEMCO, were then brought under RCW 7.04, *et seq.* The arbitration concluded in trial proceedings between Ms. McKenzie and Mutual of Enumclaw in Seattle in June 1999, and resulted in an award of $59,190. (CP 204; CP 11-12).

Motion to Vacate. In July 1999, a notice of appeal to the King County Superior Court was filed by petitioner, and in September 1999, a motion to vacate the arbitration award under RCW Section 7.04.160(4) was filed on statutory and constitutional grounds for lack of a record of the proceedings. (CP 1-2; CP 197). On October 22, 1999, the motion to vacate was denied by the trial court. (Pet. App. C, 1-2; CP 266-267). On November 22, 1999, a timely notice of appeal was filed by petitioner with the Washington Court of Appeals (Div. I). (CP 268-270).

Decisions on Appeal. On February 12, 2001, the Court of Appeals affirmed the judgment denying petitioners' motion to vacate the arbitration proceedings. In so ruling, and relying on *Boyd v. Davis,* 127 Wn.2d 256, 897 P.2d 1239 (1995), and *Expert Drywall, Inc. v. Ellis-Don Constr.,* 86 Wn. App. 884, 939 P.2d 1258 (1997), *review denied,* 134

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Wn.2d 1011, 954 P.2d 276 (1998), the decision held that a verbatim record is not required when a court reviews arbitration proceedings. In reliance on these cases, the opinion states that evidence before the arbitrators is not considered in deciding whether an award should be vacated, and that appellant cannot show that the absence of a record is a basis for vacating the award. It also held, in reliance on *Barnett v. Hicks*, 119 Wn.2d 151, 829 P.2d 1087 (1992), that RCW 7.04.220 does not expand the breadth of judicial inquiry, that by submitting a matter to arbitration, the parties limit the scope of appellate review, and that the lack of a recorded transcript is therefore irrelevant. (Pet. App. A, 1 & 4-6).

On September 5, 2001, the Washington Supreme Court dismissed the appeal in an unreported decision. Like the Court of Appeals, it apparently considered, but rejected, petitioner's due process and equal protection arguments on the constitutional right to a record for purposes of appeal and obtaining an effective appellate review under this Court's decisions in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), *Lindsey v. Normet*, 405 U.S. 56 (1972), *Mayer v. City of Chicago*, 404 U.S. 189 (1971), *Boddie v. Connecticut*, 401 U.S. 371 (1971), *Draper v. Washington*, 372 U.S. 487 (1963), and *Griffin v. Illinois*, 351 U.S. 12 (1956), and her arguments on the constitutional right of access to the courts, and the abridgement of these rights under some of these same cases. It also rejected her arguments of error and constitutional infirmity by the Court of Appeals in the application of the state decisions as the predicate for the conclusion that a record is irrelevant

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when a court reviews proceedings under RCW 7.04.220[1], and moreover, dismissed her arguments under state appellate decisions in *Dependency of Grove*, 127 Wn.2d 221, 897 P.2d 1252 (1995), *Barrie v. Kitsap County*, 84 Wn.2d 579, 527 P.2d 1377 (1974), *State v. Larson*, 62 Wn.2d 64, 381 P.2d 120 (1963), and *State v. Woods*, 72 Wn. App. 544, 865 P.2d 33 (1994), which have incorporated the principles in *Boddie*, *Draper* and *Griffin*, and which have resolutely held that a trial record is required in order to assure a full and complete judicial review.

The federal issues in this case accordingly were properly and timely raised in the Washington courts. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980).

REASONS FOR GRANTING THE PETITION

Section I of this petition and request for review by the United States Supreme Court discusses the importance of the federal due process issues in this case and the conflict between the decisions of the state courts arbitrarily depriving petitioner of a record and of access to the appellate system, and this Court's decisions in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), *Mayer v. City of Chicago*, 404 U.S. 189 (1971), *Boddie v. Connecticut*, 401 U.S. 371 (1971), and *Griffin v. Illinois*, 351 U.S. 12 (1956). Section II of this petition addresses the equal protection arguments in this case, and the importance of the federal issue in this setting, and anchors the decisions dismissing the appeal with this Court's equal protection cases in *Lindsey v.*

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[1] RCW 7.04.220 provides in pertinent part, "An appeal may be taken from any final order made in a proceeding under this chapter . . . as from an order or judgment in any civil action."

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Normet, 405 U.S. 56 (1972), and other cases that have found arbitrary state action. Before turning to these issues, it should be stated that this case involves private parties, and that the decision of the Washington Supreme Court involves state action and is reviewable under the Fourteenth Amendment. This is clear from the cases in which this Court has reviewed state appellate procedures under the Fourteenth Amendment in cases between private parties. See, *e.g.*, *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988).

I.

THE DECISION OF THE SUPREME COURT OF WASHINGTON RAISES IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW, AND CONFLICTS WITH THIS COURT'S DUE PROCESS DECISIONS IN *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), *MAYER v. CITY OF CHICAGO*, 404 U.S. 189 (1971), *BODDIE v. CONNECTICUT*, 401 U.S. 371 (1971), AND *GRIFFIN v. ILLINOIS*, 351 U.S. 12 (1956)

A long line of this Court cases "have confronted, in diverse settings, the 'age-old problem' of '[p]roviding equal justice for poor and rich, weak and powerful alike.' " *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996), citing *Griffin v. Illinois*, 351 U.S. 12, 16 (1955). With regard to "access to appeal in general, and transcripts needed to pursue appeals in particular, *Griffin* is the foundation case." 519 U.S., at 110.

In *Griffin v. Illinois*, the Court was confronted with a criminal case involving convictions for armed robbery in which petitioners sought for an appeal in the Illinois courts a certified copy of the record and a transcript of

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proceedings without cost. Petitioners were indigent and could not pay the fees to acquire a transcript and the court records needed for an appeal. Under state law, parties without means in criminal cases could obtain a transcript without cost for appellate review of constitutional questions, but not for review of alleged trial errors such as the admissibility and sufficiency of evidence as in death penalty cases. The Illinois Supreme Court dismissed their petition because they raised no substantial constitutional questions. This Court vacated the judgment and held that although a state is not required by the "Constitution to provide appellate courts or a right to appellate review," once a state provides that right, it must also provide persons without means a transcript (or its equivalent) without cost, notwithstanding their poverty or lack of means, so that they can be afforded as adequate an appellate review as defendants with financial means to buy transcripts. The Court emphasized that its holding was grounded in the Due Process and Equal Protection Clauses of the Fourteenth Amendment to protect persons like petitioners from unfair and injurious or "invidious discrimination." See 351 U.S., at 18-20.

In subsequent cases affirming *Griffin's* principle, that a State denies a constitutional right guaranteed by the Fourteenth Amendment if it allows convicted appellants to have appellate review except those who cannot afford to pay for the records of their trials, this Court held that this constitutional right had been denied in these cases. In *Eskridge v. Washington Prison Bd.*, 357 U.S. 214 (1958), petitioner was convicted of homicide in a Washington state court in 1935, and sentenced to life imprisonment. This Court held that the State was required to furnish a transcript of the trial without cost to petitioner, who was

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indigent, even though the trial court had refused his request, and had found that "justice would not be promoted . . . in that defendant has been accorded a fair and impartial trial, and in the Court's opinion no grave or prejudicial errors occurred therein." This Court affirmed *Griffin*, holding:

> "The conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript." 357 U.S., at 216.

A few years later, this Court revisited its holdings in *Griffin* and *Eskridge*, in *Draper v. Washington*, 372 U.S. 487 (1963). In this case, two indigent defendants were convicted of robbery in a jury trial and sentenced to terms of 40 years. They appealed the convictions, and being without funds, requested a transcript of the record at state expense. After *Eskridge*, the rules governing transcripts at state expense in Washington courts permitted indigent persons convicted of a felony to obtain a transcript of the record without cost if they successfully ran the procedural gamut of satisfying the trial court that the appeal was not "frivolous." If the court believed the appeal "frivolous," the appellant could not get a transcript and the appeal was blocked. Under this standard, the trial court denied their request for a transcript, and determined that the appeal was "patently frivolous." It also found that "the furnishing of a statement of facts would result in a waste of public funds," and then summarized in a brief statement the facts which it thought had been proven at their trial. The Washington Supreme Court denied review, holding that the trial court had properly found the appeal to be frivolous. 372 U.S., at 490-93.

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This Court reversed the decision, and reaffirming *Griffin* and *Eskridge* stated, "By the very nature of the procedure, the Supreme Court's ruling was made without benefit of reference to any portion of a stenographic transcript of the jury trial." 372 U.S., at 493. "In all cases the duty of the State is to provide the indigent as . . . effective an appellate review as that given appellants with funds. . . . " *Id.*, at 496. "By allowing the trial court to prevent petitioners from having stenographic support or its equivalent for presentation of each of their separate contentions to the appellate tribunal, the State of Washington has denied them rights assured them by this Court's decisions in *Griffin* and *Eskridge*." 372 U.S., at 497-98.

The Court continued, "We hold today that the conclusion of the trial judge that an indigent's appeal is frivolous is a similarly inadequate substitute for the full appellate review available to nonindigents in Washington, when the effect of that finding is to prevent an appellate examination based upon a sufficiently complete record of trial proceedings themselves." 372 U.S., at 499-500.

The principles in *Griffin, Eskridge,* and *Draper* have not been confined to cases in which a felony, imprisonment or incarceration is involved. In *Mayer v. City of Chicago,* 404 U.S. 189 (1971), the defendant was convicted on nonfelony charges of violating two city ordinances (disorderly conduct and interference with a police officer), and fined $250 for each offense. Being without funds to obtain a transcript of the trial, the defendant petitionerd for a transcript oat state expense to support the appeal based on insufficient evidence for conviction and

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misconduct of the prosecutor denying him a fair trial. The trial court found that he was indigent, but denied the request because state law provided for transcripts at state expense for indigent appellants in felony cases only. The Illinois Supreme Court denied the petition without opinion. *Id.*, at 191-93.

This Court vacated the order, and declined to limit *Griffin* to cases in which a defendant is faced with imprisonment or conviction for a felony. "The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed." 404 U.S., at 197. Petty offenses of the kind here, said the Court in *Mayer*, can have practical effects that "are not to be minimized." *Id.* "A fine may bear as heavily on an indigent accused as forced confinement. The collateral consequences of conviction may be even more serious," as when, the Court conjectured was a possibility in this case, "the impecunious medical student finds himself barred from the practice of medicine because of a conviction he is unable to appeal for lack of funds." *Ibid.*

Relying on *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966), this Court in the *M.L.B.* and *Mayer* cases stated, "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *M.L.B.*, 519 U.S., at 111; *Mayer*, 404 U.S., at 193. The Court in *Mayer* specifically noted that the distinction drawn by the state law allowing for transcripts at state expense for indigent appellants in felony cases only was an "unreasoned distinction proscribed by the Fourteenth Amendment," *Id.*, at 196 (internal quotation marks omitted), and moreover concluded that the appellant in the state courts could not be denied a "record of sufficient completeness" to permit proper consideration of his claims. *Id.*, at 198.

The rationale of these cases applies to civil cases involving fundamental rights, *M.L.B. v. S.L.J.*, 519 U.S. 102, 119-21, 128 (1996) (the Court has recognized that there are civil cases where the state must provide access to the courts without regard to a party's ability to pay court fees, and holding that the *Griffin*, *Mayer* and *Boddie* line of cases applies to invalidate a state's refusal to pay for transcripts on appeal in a civil case where fundamental rights are involved), and to an array of civil cases where due process and equal protection issues are present. See, *e.g.*, *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) ("We agree with appellants . . . that the double-bond prerequisite for appealing an FED action [in forcible entry and wrongful detainer cases] violates their right to equal protection of the laws," and holding that, "When an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause," citing *Griffin* and *Gardner v. California*, 393 U.S. 367 (1969) (holding that in the context of California's habeas corpus procedure, the state courts' denial of stenographic transcripts to petitioner marks the same invidious discrimination the Court held impermissible in the *Griffin* and *Long v. District Court*, 385 U.S. 192 (1966) cases)).

Boddie v. Connecticut, 401 U.S. 371 (1971), was decided the same year that *Mayer* was decided. The decision in *Boddie* added much of the rationale of *Griffin* to civil cases involving fundamental rights. In *Boddie*, this Court held that the Due Process Clause does not permit a sixty dollar filing fee to be imposed, as a condition to filing a petition for dissolution, upon those who are unable to pay this cost. The Court's opinion stated, "In *Griffin*, it was the requirement of a transcript beyond the means of the indigent that blocked access to the judicial process." The filing fee in dissolution cases does the same thing, and the opinion emphasized that "the rationale of *Griffin* covers this case." 401 U.S., at 382. The Court emphasized that its decision was substantially based on the reality that resort to the courts was the only way in which people

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could seek lawful dissolution of their marriages. *Id.*, at 376-77. The Court also wrote:

> " . . . due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." 401 U.S., at 377.

The principles in these cases are strong in Washington, not just in civil cases, but in all types of proceedings where the adequacy of a record for purposes of appeal is in issue. See *Dependency of Grove*, 127 Wn.2d 221, 234, 239, 897 P.2d 1252 (1995) (holding in part that, "[e]ffective representation requires an adequate record on appeal as well as the ability to file a notice of appeal and to represent the case to the appellate court," citing *Griffin* and *Draper*, and also citing *Boddie*, stating, "[t]he fact that the opportunity to appeal has been made available by statute prevents the State from arbitrarily depriving a litigant of access to the appellate system."); *Parkridge v. Seattle*, 89 Wn.2d 454, 464, 573 P.2d 359 (1978) (in rezone proceedings, a verbatim record is required in order to assure a full and complete judicial review); *Barrie v. Kitsap County*, 84 Wn.2d 579, 586, 527 P.2d 1377 (1974) ("A full and complete record is important in all types of proceedings."); *Loveless v. Yantis*, 82 Wn.2d 754, 762-63, 513 P.2d 1023 (1973) (holding in part that the courts cannot determine the legality of action by a planning commission or zoning authority unless there is a complete and accurate transcript of the proceedings before such bodies); *State v. Larson*, 62 Wn.2d 64, 66, 381 P.2d 120 (1963) (citing *Draper*, and holding that a narrative statement of facts consisting of the trial court's notes, which were substituted for a verbatim statement of facts for use on appeal when the

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court reporter's notes were lost, did not afford due process of law); *State v. Woods*, 72 Wn. App. 544, 551, 865 P.2d 33 (1994) (trial court's failure to record the hearing in a paternity proceeding denied appellant a complete record on appeal, citing *Draper*).

Dependency of Grove involved motions for expenditures of public funds in cases involving the father of children who were the subject of a juvenile court delinquency action, an action involving a party transferred to a commitment center for evaluation as a sexually violent predator, and an action where a worker sought review of a jury verdict resulting in the termination of worker compensation benefits. The petitioners were determined to be indigent, and requested approval of public payment of the expenses necessarily incident to appellate review and of the expenses of appointed counsel to represent them at public expense. The motions were granted in the dependency and commitment actions, but denied in the worker's compensation action.

The *Parkridge* and *Loveless* cases involved rezone proceedings, and determinations by the courts that a verbatim record is required in these cases to assure a full and complete judicial review. *State v. Larson* was a criminal case involving a conviction for attempted burglary, and *State v. Woods* involved a paternity proceeding in which the father and mother appeared pro se, with a deputy prosecuting attorney representing the State. *Barrie v. Kitsap County*, a case decided by the Washington Supreme Court involving rezone proceedings, is dispositive for its statement of Washington law that, "A full and complete record is important in all types of proceedings." In *Barrie*, the Court also wrote, " . . . the necessity of an adequate record is especially acute when the court is called upon to review adjudicatory proceedings, and further stated,

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"The very purpose for requiring a record is to provide an adequate factual accounting which will enable a reviewing court to resolve the issues before it in a given case." 84 Wn.2d, at 586-87.

The *Barrie* case, and the integration of the *Griffin*, *Draper*, and *Boddie* principles into state law substantively point to the disposition in this case. The arbitration proceedings conducted by statute between Ms. McKenzie and Mutual of Enumclaw involved adversarial trial proceedings. The underlying interests, permanent and potentially disabling injuries, and the right conferred by statute to appeal, are no less important than the interests in rezone proceedings, and are as important as the right to provision for a transcript for an appeal in the *Mayer* case, where a medical student without means was faced not with imprisonment, but with a $500 total fine for two misdemeanor offenses. As in *Mayer*, where the Court found that the practical effects of conviction for even petty offenses "are not to be minimized," 404 U.S., at 197, the collateral consequences of an accident resulting in parasthesis and radiculopathy are no less serious when an appellant with lifelong and conceivably unknown other injuries finds himself or herself unable to appeal for lack of a record of their trial.

In this case, the statute here, RCW 7.04, *et seq.*, provides for appeals and recognizes the necessity for a record of proceedings in appeals as in any civil action:

> "An appeal may be taken from any final order made in a proceeding under this chapter, or from a judgment entered upon an award, *as from an order or judgment in any civil action.*" (italics added).

RCW 7.04.220. The statute clearly incorporates in its provisions statutes and civil rules relating to appeals in civil

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actions. This is consistent with the language of the statute. The requirement of a record in arbitration trial proceedings under RCW 7.04, *et seq.*, is consonant with the statute, and more importantly, is mandated by the language of the statute which incorporates statutes and civil rules relating to appeals in civil actions. This result is also consistent with due process doctrines.

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Under state law, and consistent with *Mathews*, courts have authority to supplement statutory provisions by requiring additional procedures to satisfy procedural due process. *State v. Thorne*, 129 Wn.2d 736, 769, 921 P.2d 514 (1996); *In Re Schuoler*, 106 Wn.2d 500, 510, 723 P.2d 1103 (1986) (quoting *Mathews*, and noting that Washington courts have adopted the balancing test in *Mathews* for reviewing the constitutional adequacy of statutory procedures).

The opportunity to appeal in the present case has been made available by statute "from any final order made in a proceeding under this chapter, or from a judgment entered upon an award, *as from an order or judgment in any civil action,*" and accordingly, due process considerations also necessitate that statutes and civil rules relating to appeals in civil actions apply as a part of RCW 7.04.220, and moreover, recognize the necessity of a record of proceedings as in any civil action for purposes of appeal and obtaining appellate review under the statute.

Any other result subjects the statute to arguments of being unconstitutional as applied in this case. A statute found to be facially valid, for example, may be deemed unconstitutional as applied to a person or group if ordinary people must guess as to its meaning or if it is

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enforced in an excessively restrictive or burdensome manner against an individual or group in a given case. *Spokane v. Douglass*, 115 Wn.2d 171, 179-82, 795 P.2d 693 (1990); *Vicary v. City of Corona*, 935 F.Supp. 1083, 1088 (C.D. Cal. 1996). An as applied challenge to a statute asserts that the statute is unconstitutional as applied on the facts of the particular case. *Republican Party v. PDC*, 141 Wn.2d 245, 282, 4 P.3d 808 (2000). A determination that a statute's application is unconstitutional as applied to a particular plaintiff does not render a statute invalid, it only invalidates the particular application of the statute. *Id.*

This result does not seem plausible under due process doctrines in Washington. The statute, however, was unconstitutionally applied in this case. The clear language of the Statute and due process considerations require that statutes and civil rules relating to appeals in civil actions apply as a part of RCW 7.04.220, and also require a verbatim record for purposes of appeal and obtaining appellate review. Considering that there is clear authority under this Court's due process cases and under Washington law to supplement the statute with these safeguards to satisfy procedural due process, the statute is unconstitutional as applied on the facts of this case.

Under RCW 7.04.220, there is no doubt that state statutes and civil rules relating to appeals in civil actions apply as a part of the statute. Under Washington Rule of App. Proc. 2.2(a)(1), an appeal may be taken as a matter of right from any final judgment. The right to appeal includes all orders and rulings listed in the rule. The appellate court, however, may remand a case for a new trial where the trial court's report of proceedings is inadequate. *Woods*, 72 Wn. App., at 550. Alleged errors will not ordinarily be considered if the relevant part of the

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APPENDIX A

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate reports but will be filed for public record pursuant to RCW 2.06.040. IT IS SO ORDERED

/s/ Susan R. Agid

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LEAH E. McKENZIE, Appellant,	)	No. 45634-2-I
v.	)	DIVISION ONE
MUTUAL OF ENUMCLAW INSURANCE COMPANY, Respondent.	)	UNPUBLISHED OPINION
	)	FILED: FEB 12 2001

PER CURIAM. – In this appeal Leah McKenzie contends that an arbitration award should be set aside because there is no verbatim transcript of the underlying arbitration proceedings and, thus, she has been denied her right to a full and complete record on appeal. However, this argument blurs the distinction between the scope of appellate review of arbitration proceedings and judicial proceedings. As a general rule, a verbatim record is not required when a court is called upon to review arbitration proceedings. McKenzie received all the process due her. Accordingly, we affirm.

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record is not provided. *Reed v. Pennwalt Corp.*, 93 Wn.2d 5, 604 P.2d 164 (1979) (record failed to show objections regarding instructions); *Bich v. General Electric Co.*, 27 Wn. App. 25, 614 P.2d 1323 (1980) (alleged improper remarks on final argument not contained in record); *Heilman v. Wentworth*, 18 Wn. App. 751, 753-54, 571 P.2d 963 (1977) ("We decline the implied invitation to search through an incomplete record. . . . Additionally, we refuse to consider the . . . contention that this matter was adequately covered by the testimony of other physicians and the defendant's cross-examination of the doctor in question.").

It is true that judicial review of an arbitration award under RCW 7.04 does not include a review of the merits of a case, and that ordinarily, evidence before the arbitrators will not be considered by the court, *Davidson v. Hensen*, 135 Wn.2d 112, 119, 954 P.2d 1327 (1998), and moreover, that a court reviewing an award under the statute cannot conduct a trial de novo in confirming, vacating, modifying or correcting an award. *Price v. Farmers Ins. Co.*, 133 Wn.2d 490, 496-97, 946 P.2d 388 (1997). It is equally true that there are cases where the courts must necessarily review the evidence submitted to the arbitrators to determine whether the grounds for vacating an award under RCW 7.04.160[2] are present, or

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[2] RCW 7.04.160 provides that in the following cases, the court shall after notice and hearing make an order vacating the award, upon the application of any party to the arbitration: (1) Where the award was procured by corruption, fraud, or other undue means; (2) Where there was evident partiality or corruption in the arbitrators or any of them; (3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior, by which the rights of any party have been prejudiced; (4) Where the arbitrators exceeded their powers, or

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for example, to ascertain the law governing a disputed point, and it is also true that there are cases where a verbatim record is necessary to discern whether there are errors of law or mistaken applications of the law in rulings that affect the award in proceedings under the statute. *Boyd v. Davis*, 127 Wn. 2d 256, 260-61, 897 P.2d 1239 (1995); *Seattle Packaging Corp. v. Barnard*, 94 Wn. App. 481, 487-89 n.2, 972 P.2d 577 (1999); *ACF Property Management v. Chaussee*, 69 Wn. App. 913, 917 n.4, 850 P.2d 1387, *review denied*, 122 Wn.2d 1019, 863 P.2d 1353 (1993).

In these cases, a record of proceedings is necessary as a basis for showing an error of law or a mistaken application of the law as grounds for vacation or modification of the decision or award under the statute. The circumstances are no different here.

In this case, there were many objections on the admissibility and propriety of evidence, and with questions and testimony in the arbitration trial proceedings between Ms. McKenzie and Mutual of Enumclaw ranging from foundational and hearsay objections to the admissibility of evidence. (CP 262). None of this can be tested without a record in motions that are made by parties that affect the award, or for that matter, in motions for reconsideration of an arbitration award which clearly would affect the award on its face, and it is not possible to determine whether any of this affected the decision in this case.

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so imperfectly executed them that a final and definite award upon the subject matter was not made; (5) If there was no valid arbitration agreement and the proceeding was instituted without either serving a notice of intention to arbitrate, as provided in RCW 7.04.060, or without serving a motion to compel arbitration, as provided in RCW 7.04.040(1).

The decision of the Washington Supreme Court in the present case is in conflict with the rationales of this Court's due process decisions in *M.L.B.*, *Mayer*, *Boddie*, and *Griffin*. This case is a reflection of *Griffin's* principle that a State denies a constitutional right guaranteed by the Fourteenth Amendment if it allows persons with means in criminal cases to have appellate review except those who cannot pay for the records of their trials. As in *Griffin*, where the Court noted that appellate review had become an integral part of the Illinois trial system for adjudicating the guilt or innocence of a defendant, 351 U.S., at 18, review by appeal in Washington has become a basic part of the system in criminal and civil cases. Once a State provides that right, said the Court in *Griffin*, it may not "bolt the door to equal justice," *id.*, at 24 (Frankfurter, J., concurring in decision), and consequently, at all stages of the proceedings, the Due Process and Equal Protection Clauses of the Fourteenth Amendment protect persons from invidious discrimination. *Id.*, at 18.

The prism of *Griffin's* principle, which was applied in *Mayer* to a medical student without means who was convicted on nonfelony charges of violating two city ordinances and fined $500 for the offenses, and more recently in *M.L.B.*, a civil case involving a party whose parental rights were terminated and who lacked the funds to pay for record preparation fees for an appeal, covers an inconsequential difference in this case. The disparity is that petitioner has some means, albeit limited, to pay for the costs of her appeal in a civil case involving injuries from an automobile accident from which she has not recovered. The distinction is without consequence because of the basic precept stated in *Boddie* that due process "requires . . . a meaningful opportunity to be heard." 401 U.S., at 377.

The emphasis in *Boddie* that "the rationale of *Griffin* covers this case," ably envisions that, consistent with *Griffin*, appellants with means, even if limited, cannot be denied a record of sufficient completeness to permit proper consideration of their appeals, and a complete judicial review to which they are entitled as a matter of due process. Like *Boddie*, the appellant's plight in this case, because resort to the judicial process is the only avenue to resolution of disputes, is like "that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of a defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one." 401 U.S., at 376-77.

As previously explained in this petition, state law has incorporated the principles in *Boddie*, *Draper* and *Griffin*, and in essence guarantees for purposes of appeal the right to a record of proceedings in civil and criminal cases. (*ante*, at 15-16). The Due Process Clause of the Fourteenth Amendment prevents the States from denying persons the use of established state law procedures, when the denial would be the "equivalent of denying them an opportunity to be heard upon their claimed rights." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982) (citing *Boddie v. Connecticut*, 401 U.S. 371 (1971)). The court has emphasized that the hallmark of property is an entitlement under state law, which cannot be removed except for cause. *Logan*, 455 U.S., at 430.

The right of a party under state law to a record in civil and criminal cases for purposes of appeal is as important as the right found in *Logan* to use Fair Employment Practices Act adjudicatory procedures in an employment discrimination case, and is an entitlement

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grounded in state law. The decision of the Washington Supreme Court refusing to permit petitioner's appeal, and affirming the holding that a record is not required when a court reviews arbitration trial proceedings under state law, and that the lack of a recorded is irrelevant in these proceedings, has removed a right without cause to which she is entitled under state law.

This Court's due process cases have "recognized, either explicitly or implicitly, that because 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.' " *Id.*, at 432. "[A]ny other conclusion would allow the State to destroy at will virtually any state-created property interest." *Ibid.* This result is what has occurred in this case.

The purpose of the Due Process Clause is to prevent arbitrary deprivations of liberty or property. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434 (1994). "When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Id.*, at 430. As in that case, the safeguards of judicial review in appeal proceedings through protections which statelaw provides against arbitrary deprivations of property, are removed by state court rulings which eliminate the right to a record of proceedings for purposes of appeal when that right is provided for under state law, and under this Court's decisions in the *M.L.B.*, *Boddie*, *Mayer*, and *Griffin* cases.

The principles in these cases, which are reflected in Washington cases, that the State having created a right of appeal must give all persons a fair and equal opportunity to enjoy the right, are violated by an appeal that does not

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vacate arbitration proceedings where a record of the proceedings for purposes of appeal and obtaining an effective appellate review does not exist. The failure to provide for full appellate review for persons such as the petitioner, when such review is available for others where a record exists, is an unreasoned distinction that impedes open and equal access to the courts. See *M.L.B.*, 519 U.S., at 111; *Mayer*, 404 U.S., at 193. Washington has removed established safeguards provided for under state and federal law in this case, and its denial of these protections violates the Due Process Clause of the Fourteenth Amendment.

II.

THE DECISION OF THE SUPREME COURT OF WASHINGTON RAISES IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW, AND CONFLICTS WITH THE REASONING OF THIS COURT'S EQUAL PROTECTION CASES IN *LINDSEY v. NORMET*, 405 U.S. 56 (1972), AND *LOGAN v. ZIMMERMAN BRUSH CO.*, 455 U.S. 422 (1982)

The fundamental importance of equal treatment in the courts, and in affording to individuals procedural and substantive privileges on an equal basis with others who cannot reasonably be classified differently, is based in the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

This Court long ago held that the right to like treatment in our courts is guaranteed by the Fourteenth Amendment. In *Barbier v. Connolly*, 113 U.S. 27 (1885), this Court wrote, "The Fourteenth Amendment . . . undoubtedly intended . . . that all persons . . . should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no

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impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances, that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. . . . " 113 U.S., at 31.

In a number of this Court's equal protection cases, it has consistently been required that "legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). The classificatory scheme must rationally advance a reasonable and identifiable governmental objective. *Id.* at 235.[3]

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[3] Application of this standard assumes that a constitutionally protected right, where classifications burdening or infringing these rights are required to be justified as necessary to promote a compelling state interest, is not present in this case. See *Lindsey*, 405 U.S., at 73 (1972). In this case, the denial of a record to a party in a case on appeal, where the statute that governs appeals under RCW 7.04.220 integrates state statutes and civil rules relating to appeals in civil actions as a part of the statute, has the same effect as in *Boddie* of preventing a party from gaining meaningful access to the courts before the case is filed, and as in *Mayer*, of preventing a party from gaining meaningful access to the courts after the case is filed, by preventing an effective appellate review in the absence of a record.

The right of access to the courts is a fundamental right protected by the constitution. *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (" . . . the fundamental constitutional right of access to the courts requires . . . authorities to assist inmates in the preparation and filing of meaningful legal papers by providing [them] with adequate law libraries or adequate assistance from persons trained in the law."); *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907) (" . . . there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at

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In *Lindsey v. Normet*, the Court's opinion, by Justice White stated, "When an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." 405 U.S., at 77. The basis of the argument is that as in *Lindsey*, where the double-bond requirement imposed by Oregon law on tenants seeking to appeal decisions in eviction actions was found to violate the Equal Protection Clause, the denial of a record of proceedings to a party in appeal proceedings heavily burdens the right to appeal.

RCW 7.04.220, the statute at issue, is facially neutral, applies to all appellants seeking to appeal arbitration proceedings under the statute, and on its face, establishes no explicit classifications and does not distinguish between persons that appeal under its provisions. As the Washington Court of Appeals interpreted the statute, however, RCW 7.04.220 divides appeals, and necessarily persons appealing under the statute, into two distinct groups that are accorded very different treatment (*ante*, at 20-21). Appeals with transcripts where the evidence may be considered to determine the governing law on an issue, and to determine whether the grounds for vacating

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the foundation of orderly government. It is one of the . . . most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens."); *Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998) (" . . . [T]he right of access to the courts is a fundamental right protected by the Constitution," citing *Chambers*, and holding that plaintiffs "have indeed alleged a constitutional violation, namely that defendants violated [their] right of meaningful access to the courts by covering up the true facts surrounding Erin Rae Delew's death."). This case is like these cases, but in a different way, as the *Boddie* and *Mayer* analogies show.

an award are present, are given full or a more thorough consideration in the appeal, and appellants (or respondents that cross-appeal) in these cases are awarded the opportunity for full judicial review. In contrast, parties without transcripts have no chance, or very little chance, to have their arguments considered, and their cases are dismissed and terminated (as this case was) without the opportunity for judicial review.

The opinion identifies three purposes associated with the statute: avoiding the formality, expense, and the delay of the court system. (Pet. App. A, 4). As in *Lindsey* and *Logan*, a state may validly take steps to provide for the "prompt [and] peaceful resolution of disputes over the right to possession of real property," 405 U.S., at 70, or to eliminate employment discrimination and to further the "just and expeditious resolutio[n]" of employment disputes, 455 U.S., at 439-40, and as in this case, may provide statutes that facilitate the resolution of appeals from arbitration proceedings under RCW 7.04 with these purposes as ends under the statute, but in so doing, may not run afoul of equal protection scrutiny. *Logan*, 455 U.S., at 439. Under *Lindsey*, arbitrary classifications by a State that burden the right to appeal violate the Equal Protection Clause under even the most deferential standard of review. 405 U.S., at 77.

Regarding the purposes of RCW 7.04.220, the statute is on the same grounds as the statutes in *Lindsey* and *Logan* that were found to deprive the appellants of equal protection. In *Lindsey*, the Court stated the double bond requirement does not effectuate the purposes of the statute (insuring that adequate security be posted before an appeal to preserve the property, to guard a damage award already made, or to insure against loss of rent if the tenant remains in possession) because it is unrelated

to actual rent accrued or to specific damage sustained by the landlord. Moreover, "The claim that the requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." 405 U.S., at 78. In *Logan*, the Court similarly stated, in assessing a State Employment Practices Act that barred employment discrimination. "Terminating potentially meritorious claims in a random manner [that the State has mis-scheduled] cannot serve to redress instances of discrimination." 455 U.S, at 439-40.

As in *Lindsey*, where the double-bond requirement was found to heavily burden the statutory right to appeal, it cannot be denied that the state courts' interpretation of the statute, which nullifies the importance of and effectively denies a record to a party in appeal proceedings under the statute, heavily burdens the right to appeal under RCW 7.04.220. The interpretation does not rationally advance or effectuate the purposes of the statute because RCW §§ 7.04.150, 7.04.160, and 7.04.170 clearly contemplate that parties may apply to the courts to confirm, vacate, modify or correct an award and decisions interpreting these statutes unambiguously state that there are cases where the courts must review the evidence to determine whether the grounds for vacating an award are present, to ascertain the law on disputed issues, and where a record is necessary to discern whether there are errors of law or mistaken applications of the law in rulings that affect the award in proceedings under the statute (*ante*, at 20-21).

These realities buttress the conclusion that the interpretation of the statute is unrelated to its purpose of avoiding the formality, expense, and the delay of the

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court system. Moreover, as in *Logan*, terminating potentially meritorious appeals in a random manner without a record, on the rationale that a record is not required when a court reviews proceedings under RCW 7.04, and that the lack of a recorded transcript is irrelevant in these proceedings, when appeals under the statute are clearly considered and decided with such records, does not further these purposes, and is not rationally related to these ends.

In the present case, appeals like the appeal in this case, where the interpretation of the statute effectively annuls the importance of and denies a record to a party in an appeal under the statute, have no chance, or very little chance, for any meaningful review, and the cases are dismissed (as this case was) without the opportunity for judicial review. The State converts similarly situated claims into dissimilarly situated claims with these distinctions as a basis for unequal and inequitable classifications. "This . . . is the very essence of arbitrary state action." "[T]he Equal Protection Clause 'imposes a requirement of some rationality in the nature of the class singled out' " . . . "and that rationality is absent here." *Logan*, 455 U.S., at 442.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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12/03/01 MON 15:43 FAX 402 341 8712 COCKLE PRINTING 041

SEQ 246 JOB 11113ZZ2- 000-02 PAGE-001 KEEFE
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No. _____

In The

Supreme Court of the United States

LEAH E. MCKENZIE,

Petitioner,

v.

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Washington

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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SEQ 249 JOB 11113AA2- 000-02 PAGE-002 KEEFE
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FACTS

McKenzie was injured in a motor vehicle accident. The at-fault driver's insurer paid the full limits of the driver's liability coverage. McKenzie also had underinsured motorist (UIM) coverage with Mutual of Enumclaw. When the parties were unable to agree on the amount of the UIM coverage needed to compensate McKenzie for her injuries, the matter was submitted to arbitration under the terms of McKenzie's policy. Pursuant to the arbitration provisions of the insurance policy,[1] each party designated one arbitrator, and they, in turn, agreed on a third arbitrator. Following a hearing at which McKenzie testified and presented evidence, the arbitration panel unanimously agreed that McKenzie was entitled to an award in the amount of $59,190. Thereafter, McKenzie moved to vacate the arbitration award, arguing that it was defective because the arbitration proceedings

---

[1] "1. If we and a covered person disagree whether that person is legally entitled to recover damages from the owner or operator of any underinsured motor vehicle or do not agree as to the amount of damages, either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third and if they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. We will pay the expense of the arbitration. However, attorney's fees and all other fees including, but not limited to, fees paid to medical and other expert or non-expert witnesses will not be considered arbitration expenses and are to be paid by the party incurring them.

"2. Unless both parties agree otherwise, arbitration will take place in the county and state in which the covered person lives. A decision agreed to by two of the arbitrators will be binding."

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SEQ 250 JOB 11113AA2- 000-02 PAGE-003 KEEFE
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were never recorded. The motion was denied. This appeal followed.

DECISION

We are asked to decide whether the superior court erred in denying McKenzie's motion to vacate the arbitration award because the proceedings before the arbitrators were not recorded. McKenzie argues that she was denied her statutory and constitutional right to a full and complete record on appeal since she had no verbatim transcript of the arbitration proceedings, and that the matter must be remanded for a new "trial."[2] We disagree.

McKenzie relies on a long line of criminal and civil cases which discuss the circumstances under which court proceedings are to be recorded. Her reliance on these cases is misplaced.

Due process of law is not a mechanical instrument or yardstick.[3] While an arbitration proceeding is similar to a superior court trial in some respects, it is fundamentally different in others. "Arbitration is similar to a judicial inquiry only in that witnesses are called and evidence is considered, but the arbitrator's role is markedly different from that of a judicial officer."[4] In particular, arbitration proceedings are not bound by the strict and technical

---

[2] Throughout her briefing McKenzie mistakenly refers to the arbitration proceedings as "trial" proceedings.

[3] *See Diedrick v. School Dist. 81*, 87 Wn.2d 598, 606, 555 P.2d 825 (1976).

[4] *Westmark Properties, Inc. v. McGuire*, 53 Wn. App. 400, 402, 766 P.2d 1146 (1989).

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SEQ 251 JOB 11113AA2- 000-02 PAGE-004 KEEFE
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rules of law governing courts.[5] Rather, the purpose of arbitration is to avoid the formality, the expense, and the delay of the court system.[6] To best achieve these goals, the evidence before the arbitrators is not considered in deciding whether an award should be vacated.[7] This approach ensures that arbitration is not merely a prelude to litigation.[8] Since the evidence before the arbitrators is not considered on appellate review, McKenzie cannot show that the absence of a record of the proceedings is a basis for vacating the arbitration award.

McKenzie also appears to argue that RCW 7.04.220[9] entitles her to appeal the arbitration award and that "[t]he statute unambiguously incorporates in its provisions statutes and civil rules relating to appeals in civil actions." Because these other statutes and court rules require a verbatim trial record for purposes of appellate

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[5] *Barnett v. Hicks*, 119 Wn.2d 151, 155, 829 P.2d 1087 (1992).

[6] *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 765-66, 934 P.2d 731 (1997).

[7] *Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995) (court reviewing arbitration award is not permitted to conduct a trial de novo); *Puget Sound Bridge & Dredging Co. v. Frye*, 142 Wash. 166, 178, 252 P.2d 546 (1927); *Expert Drywall, Inc. v. Ellis-Don Constr., Inc.*, 86 Wn. App. 884, 888, 939 P.2d 1258 (1997).

[8] *Thorgaard Plumbing & Heating Co. v. King County*, 71 Wn.2d 126, 131, 426 P.2d 828 (1967) (Arbitration is a substitute forum designed to reach settlement of controversies by extra-judicial means before they reach the stage of a lawsuit in court.)

[9] "An appeal may be taken from any final order made in a proceeding under this chapter, or from a judgment entered upon an award, as from an order or judgment in any civil action."

047
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review, McKenzie argues that her rights have been violated under RCW 7.04.220 since the arbitration proceedings here were never recorded. However, the fact that a party to an arbitration may appeal the award under RCW 7.04.220 does not expand the breadth or scope of judicial scrutiny. By submitting a matter to arbitration, the parties severely limit the scope of appellate review.[10] An arbitration award can be vacated only upon one of the grounds specified in RCW 7.04.160.[11] Moreover, the grounds for

---

[10] *Barnett*, 119 Wn.2d at 153.

[11] "In any of the following cases the court shall after notice and hearing make an order vacating the award, upon the application of any party to the arbitration:

"(1) Where the award was procured by corruption, fraud or other undue means.

"(2) Where there was evident partiality by corruption in the arbitrators or any of them.

"(3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or any other misbehavior, by which the rights of any party have been prejudiced.

"(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made.

"(5) If there was no valid submission or arbitration agreement and the proceeding was instituted without either serving a notice of intention to arbitrate, as provided in RCW 7.04.060, or without serving a motion to compel arbitration, as provided in RCW 7.04.040(1).

"An award shall not be vacated upon any of the grounds set forth under subdivisions (1) to (4), inclusive, unless the court is satisfied that substantial rights of the parties were prejudiced thereby."

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vacation must appear on the face of the award.[12] Lack of a recorded transcript is therefore irrelevant.

McKenzie also contends that the State "having created a right of appeal[,] must give all persons a fair and equal opportunity to enjoy the right" and that full appellate review is not available to a party like McKenzie unless a record of the arbitration proceeding exists. We disagree.

As we previously noted, the nature and scope of our review does not depend upon whether the proceedings before the arbitrators have been recorded. The cases of *Westmark Properties*[13] and *School District 5 v. Sage*[14] are instructive. In both cases, the court refused to review the record before the arbitrators in determining the propriety of the arbitration awards. McKenzie has not shown that she was prejudiced by the absence of a verbatim transcript.

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[12] *ACF Property Management v. Chaussee*, 69 Wn. App. 913, 919, 850 P.2d 1387 (1993) ("[J]udicial scrutiny of an arbitration award does not include review of the arbitration's decision on the merits."); *Moen v. State*, 13 Wn. App. 143, 144-45, 533 P.2d 862 (1975).

[13] 53 Wn. App. 400 (holding party misconceived the nature of arbitration and the role of the court in the process by submitting 4-volume report of proceedings and all exhibits).

[14] 13 Wash. 352, 355, 43 P. 341 (1896) (holding party misunderstood court's role by proceeding "upon the theory that this court will try and determine the matters in controversy between these parties upon the evidence which was submitted to the arbitrators, and which has been transmitted to this court as part of the record herein").

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SEQ 147 JOB 11113AA3- 000-02 PAGE-007 KEEFE
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The parties to an arbitration are entitled to reasonable notice of the hearing and an opportunity to be heard.[15] Nothing in the record here suggests that McKenzie was denied an opportunity to submit evidence during the arbitration proceedings. McKenzie received due process.

We deny Mutual of Enumclaw's request for attorney fees on appeal.

Affirmed.

For the Court:

/s/ Ellington, J
/s/ Agid, CJ
/s/ Kennedy, J

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[15] *Tombs v. Northwest Airlines, Inc.*, 83 Wn.2d 157, 161, 516 P.2d 1028 (1973).

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SEQ 255 JOB 11113AA2- 000-02 PAGE-008 KEEFE
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APPENDIX B

THE SUPREME COURT OF WASHINGTON

IN RE THE ARBITRATION OF: LEAH E. McKENZIE, Petitioner, v. MUTUAL OF ENUMCLAW INSURANCE COMPANY, Respondent.	NO. 70971-8 ORDER C/A NO. 45634-2-I

Department I of the Court considered this matter at its September 5, 2001, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 5th day of September, 2001.

/s/ Gerry L Alexander
CHIEF JUSTICE

12/03/01 MON 15:45 FAX 402 341 8712 COCKLE PRINTING 051

SEQ 256 JOB 11113AA2- 000-02 PAGE-009 KEEFE
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APPENDIX C

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

In re the Arbitration of: LEAH E. MCKENZIE, Claimant, v. MUTUAL OF ENUMCLAW INSURANCE COMPANY, Respondent.	No. 99-2-17009-1SEA DENYING ORDER ~~ON~~ MOTION TO VACATE ARBITRATION AWARD

This matter came regularly before the Court on Claimant's motion to vacate an arbitration award of June 18, 1999, in Claimant's favor in the amount of $59,190, between Claimant Leah E. Mckenzie and Respondent Mutual of Enumclaw Insurance Co. The Respondent was represented by its attorney of record, Vali M. Somers, and Claimant was represented by her attorney of record, John M. Keefe. The Court considered the record and files in this action, the presentation of counsel, and the following submissions on the motion:

(1) Claimant's motion to vacate arbitration award;

(2) Respondent's Cross Motion to Dismiss and Reply to Claimant's Motion to Vacate Arbitration Award; and

(3) Claimant's Response to Respondent's Reply to Motion to Vacate Arbitration Award;

~~(4)~~ _____;

~~(5)~~ _____;

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SEQ 257 JOB 11113AA2- 000-02 PAGE-010 KEEFE
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and being fully advised, it is hereby,

ORDERED that Claimant's motion to vacate is ~~granted~~ DENIED. ~~The UIM claims for personal injuries incurred by Claimant on April 14, 1995, shall proceed to trial as scheduled on December 11, 2000.~~

IT IS FURTHER ORDERED that Respondent's Motion for attorneys fees is granted in the amount of $500.00.

Dated: October 22, 1999.

/s/ Richard A. Jones
Judge Richard A. Jones

Presented by:

/s/ John M. Keefe
John M. Keefe,
WSBA 18371
Attorney for Claimant

Approved as to Form/for Entry; Notice of Presentation Waived

Vali M. Somers,
WSBA no. 11186
Attorney for Respondent

12/03/01 MON 15:45 FAX 402 341 8712 COCKLE PRINTING 053

JAN 2 2002

No. 01-809

IN THE

Supreme Court of the United States

LEAH E. McKENZIE,

Petitioner,

v.

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF WASHINGTON, DIVISION ONE

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Mutual of Enumclaw Insurance Company, has no parent corporation and no publicly held company owns 10% or more of its stock.

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United States Supreme Court Rule 10	1

REASONS FOR DENYING THE WRIT

The petitioner has not stated an adequate reason which would warrant consideration of his petition by the Supreme Court. The petitioner's constitutional claims are without merit and the sole basis for this petition and appeal is that the petitioner failed to request that the arbitration proceedings be recorded.

According to Rule 10 of the Rules of the Supreme Court of the United States, a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. The petitioner has no grounds to appeal a binding UIM award. Therefore, the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

Mutual of Enumclaw issued underinsured motorist (UIM) coverage to the driver of a vehicle the plaintiff was riding in when a car accident occurred. Under that policy, Mutual of Enumclaw promised to pay whatever damages the plaintiff is legally entitled to recover from the owner or operator of an underinsured motor vehicle.[1]

The plaintiff claimed such damages. CP 176- 177. But the parties could not agree as to the amount of damages the plaintiff was legally entitled to recover. Consequently, the parties arbitrated that question pursuant to the policy's arbitration clause, which states as follows:

> 1. If we and a covered person disagree whether that person is legally entitled to recover damages from

1. The UIM coverage is subject to conditions, limits and restrictions, none of which are at issue in this case.

> the owner or operator of any underinsured motor vehicle or do not agree as to the amount of damages, either party may make a written demand for arbitration. In this event, each party will select an arbitrator. The two arbitrators will select a third and if they cannot agree within 30 days, either may request that selection be made by a judge of a court having jurisdiction. We will pay the expense of the arbitration. However, attorney's fees and all other fees including, but not limited to, fees paid to medical and other expert or non-expert witnesses will not be considered arbitration expenses and are to be paid by the party incurring them.
>
> 2. Unless both parties agree otherwise, arbitration will take place in the county and state in which the covered person lived. **A decision agreed to by two of the arbitrators will be binding.**

CP 229 (some emphasis deleted, other emphasis added).

The plaintiff's attorney appointed Steve Adelstein as his arbitrator and Mutual of Enumclaw appointed Barry Johnson as their arbitrator. Mr. Adelstein and Mr. Johnson agreed to appoint Larry Levy as the third arbitrator. CP 220.

With the agreement of all parties, the arbitration hearing was scheduled for June 18, 1999. Both parties presented evidence, including the testimony of one of claimant's health care providers. CP 220.

On June 18, 1999, the arbitrators rendered a unanimous verdict in the amount of $59,190.00. CP 231. The claimant's

attorney requested clarification of the award and on July 22, 1999 Larry Levy, indicated that the award of $59,190.00 included all damages. CP 234. This clarification was agreed to by all three arbitrators. CP 234. After that the plaintiff's attorney filed this lawsuit in an attempt to vacate the unanimous binding arbitration award.

The only ground for setting aside the award is that the arbitration proceedings were never recorded. *See pp. 9-10 of the appellant's opening brief.* But the plaintiff's attorney never requested the proceedings be recorded. CP 238: 17-21. Rather, the first time the plaintiff ever complained about that fact was not until after the arbitrators returned their award. *Id.*

In particular, the plaintiff claimed that since the arbitration proceedings were never recorded, the arbitration statute which allows arbitrations somehow violates the constitution. CP 197- 210 and CP 250- 260; *see also "IV B" and "IV C" of the appellant's opening brief.* But nothing precluded the plaintiff from recording the proceedings.

The defendant opposed the plaintiff's motion to vacate the arbitration award and moved for terms. CP 225. The court denied the plaintiff's motion and granted terms to the defendant in the sum of $500. CP 266- 267.

The petitioner then filed a notice of appeal with the Washington Court of Appeals. On February 12, 2001, the Court of Appeals affirmed the judgment denying petitioner's motion to vacate the arbitration proceedings. An order denying a petition for review was entered in the Supreme Court of Washington State on September 5, 2001.

ISSUES

1. The invited error doctrine precludes a party from claiming an error occurred below when that error was never objected to until after the result was obtained. *Sdorra v. Dickinson*, 80 Wn. App. 695, 910 P.2d 1328 (1996); *Agranoff v. Morton*, 54 Wn. 2d 341, 346-347 (1959) (overruled on other grounds by CR 50 (b)). Since the plaintiff never requested the arbitration proceedings be recorded at any time before the award was rendered, can the award be vacated on that ground?

2. Whether the claimant can appeal a binding UIM arbitration award when the statutory grounds for an appeal have not been met?

3. Whether the claimant can bring a motion to vacate an arbitration award when the statutory grounds for vacating a binding UIM arbitration award have not been met?

ARGUMENT

A. If any "error in law" occurred at the arbitration hearing, it was "invited error" because the plaintiff's attorney never requested the arbitration proceedings be recorded.

The plaintiff's sole basis for this appeal is that since the arbitration proceedings were never recorded, an "error of law" occurred which requires vacation of the award. *See pp. 9-10 of the appellant's opening brief.* But the plaintiff's attorney never requested the proceedings be recorded. CP 238: 17-21. Rather, the first time the plaintiff ever complained about that fact was not until after the arbitrators returned their

award. *Id.* Having failed to have requested the proceedings be recorded at or before the arbitration, any error on that basis was waived under the invited error doctrine.

The invited error doctrine has been set out as follows:

> It is the duty of counsel for all parties to promptly call the court's attention to any error in the trial. Counsel may not secretly nurture an error, speculate upon a favorable verdict, and then, in the event it is adverse, bring forth the error as a life preserver on a motion for a new trial.
>
> . . .
>
> . . . The rule has been stated over and over again that a party may not remain silent and take his chance on a verdict and then, if it is adverse, complain of some inadequacy which could have been quite easily corrected . . .
>
> . . .
>
> Respondent's counsel made no request for a direction on the issue of liability. Had such a request been seasonably made, it would have been granted without objection. Had it been denied, respondent would have been in a position to urge it upon a motion for new trial and, if necessary, then upon appeal. But he may not remain silent when it is time to speak, and then urge it for the first time on a motion for a new trial.

Agranoff v. Morton, 54 Wn. 2d 341, 346-347 (1959) (overruled on other grounds by CR 50 (b)).

In *Sdorra v. Dickinson*, 80 Wn. App. 695, 701-2, 910 P.2d 1328 (1996), the court said:

> According to this rule, a court may vacate a verdict not supported by substantial evidence, even if the party seeking vacation failed to object before the case was submitted to the jury. See also CR 50(b). A court may also vacate a verdict for error of law not involving a lack of substantial evidence, if the party seeking vacation objected at the time. But, by negative implication, a court may not vacate a verdict for error of law not involving a lack of substantial evidence, if the party seeking vacation failed to object or, a fortiori, invited the error. ***Cerjance v. Kehres***, 26 Wn. App. 436, 439, 613 P.2d 192 (1980).
>
> In passing, we observe that cases from other jurisdictions are split on whether a trial court has discretion to grant a new trial on the basis of invited error. For example, in ***Walter v. Simmons***, 169 Ariz. 229, 818 P. 214 (1991), a case in which the moving party had invited error by proposing an erroneous instruction, the appellate court said the trial court could correct the error "to prevent a miscarriage of justice." Other cases, however, hold to the contrary. Thus, in ***Burke v. Moyer***, 621 S.W.2d 75 (Mo. Ct. App. 1981), the trial court erroneously gave certain jury instructions that Moyer had proposed, and the jury returned a verdict for Burke. The trial court granted a new trial, and Burke appealed. Reversing the order for new trial, the appellate court said:
>
> > The instruction error . . . is not now available to Moyer as a basis to sustain

> the new trial order. [The instruction] was given by the trial court in the form tendered by Moyer and at no time prior to submission of the case did Moyer ever suggest that the definition instructions were erroneous.
>
> . . . A party cannot lead the court into error and then employ that error as a source of complaint.

Burke, 621 S.W.2d at 82. And in ***Schaffer v. Pulido***, 492 So. 2d 1157 (Fla. Dist. Ct. App. 1986), the trial court erroneously gave plaintiffs' proposed instruction 5b. After a defense verdict, the trial court granted a new trial due to instruction 5b. Reversing the order granting new trial, the appellate court stated:

> Without dispute, the plaintiffs submitted both jury instruction 5b, which the trial court gave, and the verdict form that was used in this case. This being so, the plaintiffs invited the error, if any, which occurred below and may not complain on a motion for new trial or on appeal concerning these alleged errors.

See also ***General Contractors of Am., Inc. v. Stinson***, 524 So. 2d 1148, 1151 (Fla. Dist. Ct. App. 1988) (parties "may not now secure the benefit of a new trial based upon an error which they invited"). In light of CR 59(a)(8), Washington is aligned with ***Burke***, ***Schaffer*** and ***Stinson***.

B. The plaintiff's constitutional challenges are frivolous.

Ostensibly, the plaintiff cites no cases involving insurance issues or interpreting the arbitration statute. The cases cited by the plaintiff stand for the proposition that criminal defendant's are entitled to have court proceedings recorded. Those same considerations do not apply to a contractual arbitration agreement, and no case says otherwise.

Moreover, nothing in RCW 7.04 *et seq.* nor in Mutual of Enumclaw's contract precludes the arbitration hearing from being recorded. Certainly, the plaintiff's attorney was free to do so, but did not. In fact, no request was ever made to record the proceedings and this matter was never made an issue until after the arbitrators returned their award. CP 238: 20-21.

C. Mutual of Enumclaw's policy clearly states that the UIM award is binding.

The claimant's right to make an underinsured motorist claim against Mutual of Enumclaw is based on the contract between Ms. Bisnett and Mutual of Enumclaw. The Mutual of Enumclaw insurance policy that was in effect at the time of the accident states the following regarding the procedure that is to be used when there is a disagreement regarding damages:

> 1. If we and a covered person disagree whether that person is legally entitled to recover damages from the owner or operator of any underinsured motor vehicle or do not agree as to the amount of damages, either party may make a written demand for arbitration. In this event, each

> party will select an arbitrator. The two arbitrators will select a third and if they cannot agree within 30 days either may request that selection be made by a judge of a court having jurisdiction...
>
> 2. Unless both parties agree otherwise, arbitration will take place in the county and state in which the covered person lives. *A decision agreed to by two of the arbitrators will be binding.*

In the case at bar, all three arbitrators rendered an unanimous verdict. Therefore, according to the unambiguous language of the contract, the arbitration award is binding. The claimant does not have any right to appeal the award simply because she does not agree with it. Therefore, claimant's appeal of the arbitration award was properly dismissed.

Washington State has a strong public policy in upholding verdicts in binding arbitration cases. *Petersen v. United Servs. Auto*, 91 Wn. App. 212, 216 (1998). RCW 7.04 does not have any language regarding the right of a party to appeal the arbitration award, therefore, the claimant's appeal to the trial court was properly denied.

D. Claimant had no valid grounds to appeal the binding UIM arbitration award.

RCW 7.04.010 states the following regarding agreements to arbitrate disputes:

> Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this chapter, any controversy which

> may be the subject of an existing action between them at the time of the agreement to submit, or they may include in a written agreement a provision to settle by arbitration any controversy thereafter arising between them out of or in relation to such agreement. Such agreement shall be valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement.

The statute clearly allows parties to agree to arbitrate their disputes. The UIM policy provision regarding arbitration is enforceable in Washington.

RCW 7.04.160 states that the an arbitration award will only be vacated if the following circumstances exist:

> (1) Where the award was procured by corruption, fraud or other undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators or any of them.
>
> (3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made.

> (5) If there was no valid submission or arbitration agreement and the proceeding was instituted without either serving a notice of intention to arbitrate, as provided in RCW 7.04.060, or without serving a motion to compel arbitration, as provided in RCW 7.04.040(1).
>
> An award shall not be vacated upon any of the grounds set forth under subdivisions (1) to (4), inclusive, unless the court is satisfied that substantial rights of the parties were prejudiced thereby.
>
> Where an award is vacated, the court may, in its discretion, direct a rehearing either before the same arbitrators or before new arbitrators to be chosen in the manner provided in the agreement for the selection of the original arbitrators and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court's order.

In the case at bar, there is absolutely no evidence to suggest that the arbitrators engaged in behavior that is stated in subsections (1) through (4) of RCW 7.04.1160. In fact, the decision rendered by the panel was unanimous. The arbitrator that the claimant appointed even agreed with the arbitration award. Also, the claimant never requested a continuance and was able to present his entire case at the arbitration hearing. Therefore, RCW 7.04.160(3) does not even apply.

The arbitrators fully executed their duties in a competent manner and did not exceed their authority in rendering a verdict. The arbitrators were asked to decide the value of the claimant's UIM claim and this was the scope of their authority. The arbitrators rendered a decision regarding Ms. McKenzie's damages as a result of the April 14, 1995 motor vehicle accident after she had presented all her medical records and approximately six hours of testimony at the arbitration hearing. This included live testimony of Dr. Thomas DePuydt. Therefore, they did not exceed the scope of their authority.

All three arbitrators are experienced attorneys and there is no reason to suspect that they did not competently execute their duties as arbitrators. Absent such a showing, the claimant has no basis to vacate the arbitration award.

The scope of review when vacating an arbitration award is limited to the standards set forth in RCW 7.04.160. It is clear that the statute will only allow a court to vacate an arbitration award if the arbitrators exceeded their authority or the conduct of the arbitration panel rose to such a level that the moving party is able to establish "impropriety" or fraudulent conduct among the arbitrators.

CONCLUSION

For the foregoing reasons, the Supreme Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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(3)

No. 01-809

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

LEAH E. MCKENZIE,

Petitioner,

v.

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Washington

REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY OF PETITIONER

This is a case involving personal injuries from an automobile accident near Snoqualmie Pass, WA, in April 1995, in which the facts as related in the petition for certiorari, the inability to appeal for lack of a record, and the underlying interests, permanent and potentially disabling injuries, have not been disputed by Mutual of Enumclaw.

The appeal from an arbitration proceeding, as provided for under state law in this case, was terminated by the state courts without a record on the rationale that a record is not required when a court reviews arbitration trial proceedings under state law, and that the lack of a record is irrelevant in these proceedings. The state courts denied the appeal despite petitioner's arguments of constitutional infirmity in the application of state law as the basis for dismissing the appeal, and over her arguments under controlling state decisions which conflict with the result. This cooperative of cases have integrated the principles of this Court's due process and equal protection cases, and have decisively held that a trial record is required in order to assure a complete judicial review. Our petition points out that, as it concerns the right to a record under state law, the safeguards of judicial review in appeal proceedings through the protections which state law provides against arbitrary deprivations of property, are removed by state court rulings which eliminate the right to a record for purposes of appeal and obtaining an effective judicial review when that right is provided for under state law, and under this Court's decisions in the *M.L.B.*, *Boddie*, *Mayer*, and *Griffin* cases. (Petition, pgs. 15-17, 24).

Mutual of Enumclaw's brief opposing certiorari veils the merits with ill conceived arguments that are in themselves irrelevant to the constitutional issues that are before this Court. Prominently, it ignores the historical

lineage of authorities that have long recognized the paramount and uncompromising importance of a record for purposes of appeal and obtaining appellate review under state and federal law; it ignores the due process arguments and decisions in the *M.L.B.*, *Boddie*, *Mayer*, *Draper* and *Griffin* cases entirely; while also ignoring Washington state court appellate decisions on this issue in *Dependency of Grove*, *Parkridge*, *Barrie*, *Larson*, and *Woods* which have in the main incorporated the principles of *Boddie*, *Draper* and *Griffin* into state law; and it ignores the equal protection arguments and decisions in *Lindsey* and *Logan* almost completely.

Mutual of Enumclaw has written at some length with misstated argument on issues that have no bearing on the constitutional issues that are before the Court, and has almost entirely failed to come to grips with petitioner's arguments in her petition for certiorari. Its arguments on the merits consist of three diversionary themes. The first concerns the contention of invited error, but Mutual of Enumclaw neglects to mention that this was rejected on a motion to dismiss the appeal below, and was not mentioned by the Court of Appeals in its opinion affirming the denial of the motion to vacate for lack of a record in this case. (Pet. App. D, 1, attached; Pet. App. A, petition). The second involves the argument that "plaintiff's constitutional arguments are frivolous," to the extent that the cases cited in the petition stand for the proposition that criminal defendants are entitled to have court proceedings recorded, that those considerations do not apply to an arbitration agreement, and "no case says otherwise." (Br. in Opp. 8). The argument is in itself frivolous because the *Dependency of Grove*, *Barrie*, and *Woods* cases, and the integration of the *Griffin*, *Draper*, and *Boddie* principles into state law authoritatively and credibly refute this insubstantial and infirm contention. Equally important, these cases stand for the basic precept stated in *Boddie*

that due process "requires . . . a meaningful opportunity to be heard." (Petition, pgs. 15-17 & 24).

The third argument, according to Mutual of Enumclaw, is that its policy states that the "UIM award is binding," that RCW 7.04 does not have any language on the right to appeal an arbitration award, and that the appeal was properly denied. (Br. in Opp. 8-9). The argument is again frivolous because RCW 7.04.220 provides for appeals by any party from a "final order in a proceeding under this chapter . . . as from an order or judgment in any civil action." In no uncertain terms, the statute has a clear directive for appeals to the appellate courts as in any civil action. As set forth more fully below, none of these contentions provide any basis for denying the petition.

A. INVITED ERROR DOES NOT APPLY IN THIS CASE AND WAS REJECTED BELOW AS A BASIS FOR PRECLUDING PETITIONER'S ARGUMENTS FOR VACATING THE AWARD AND GRANTING HER A NEW TRIAL.

Mutual of Enumclaw's general discussion of invited error is tainted by the same error that infects the rest of its brief: the manifestly false premise that invited error precludes petitioner's constitutional arguments for vacating the arbitration award. This same argument was rejected on a motion to dismiss the appeal below (Pet. App. D, 1, attached; Respondent's Motion on the Merits, pgs. 2-4). It reechoed this argument in its brief on the merits (Respondent's Brief, pgs. 4-9), and it is persuasively telling, if not dispositive, that invited error is not mentioned by the Court of Appeals in the opinion, and that the principle has no application in this case.

Mutual of Enumclaw contends that the invited error doctrine precludes a party from claiming error when that error was never objected to until after the result was obtained, citing *Sdorra v. Dickinson*, 80 Wn. App. 695, 910

P.2d 1328 (1996), and *Agranoff v. Morton*, 54 Wn.2d 341, 340 P.2d 811 (1959) (overruled on other grounds by CR 50(b)). (Br. in Opp. 8-9). This statement of the rule and the quotations from these cases are misleadingly pulled out of context.

The doctrine of invited error is based on principles of estoppel or waiver of a right to take a position inconsistent with a position initially taken. *Graham v. Graham*, 41 Wn.2d 845, 851, 252 P.2d 313 (1953). Invited error arises when a party to an action requests a ruling which is allegedly erroneous and then seeks to claim error from the ruling on appeal. *Sandler v. U.S. Development Co.*, 44 Wn. App. 98, 103, 721 P.2d 532 (Div. I, 1986) (citing *Graham supra*, and holding that the failure to accurately calculate the amount of back salary due under the court's ruling is not invited error).

The cases cited by Mutual of Enumclaw come within this statement of the rule, and are unambiguously distinguishable on this basis. See *Agranoff v. Morton*, 54 Wn.2d 341, 345, 340 P.2d 811 (1959) (in an action for personal injuries, defendant admitted liability, but plaintiff requested an instruction on the issue of defendant's negligence; when the trial court asked plaintiff's counsel to take exceptions to the instructions, he approved of them completely, and thus it was not error for the trial court to fail to limit the jury to the issue of damages); *Sdorra v. Dickinson*, 80 Wn. App. 695, 701-03, 910 P.2d 1328 (Div. II, 1996) (the trial court's errors were invited by plaintiff who argued that the jury should not be permitted to consider contributory negligence on his claim or the defendant's claim, and that the case should be submitted to the jury on a one-party-takes-all basis; after the jury said that defendant should take all plaintiff objected, for the first time, to the trial court's erroneous adoption of his position; the effect of his conduct was to waive contributory negligence should the jury elect to award damages on defendant's claim); *Cerjance v. Kehres*, 26 Wn.

App. 436, 441, 613 P.2d 192 (Div. I, 1980) (a new trial cannot be granted under CR 59 for errors of law and a failure of substantial justice when the failure is attributable to erroneous instructions given without objection, however, with respect to issues that the trial court has reserved for decision, the restrictions on granting a new trial do not apply since the trial court has rendered no decision on these aspects of the case).

Under Washington law, cases involving the invited error doctrine involve errors (or alleged errors) in rulings which a party invited or induced the trial court to commit, and did not object to, but the principle is based on estoppel and waiver, and finds its application only when facts exist which raise an estoppel or a waiver of rights to object on appeal. See *Graham*, 41 Wn.2d at 851; see also *Davis v. Globe Machine*, 102 Wn.2d 68, 76-77, 684 P.2d 692 (1984) (in a pre-trial motion in limine, petitioner sought a ruling permitting evidence of an Alabama lawsuit in a similar accident, but excluding evidence of a defense verdict in the case; the trial court denied the motion and instructed the attorneys not to mention the accident, but petitioner's expert mentioned the accident in direct examination, and the court then permitted respondent to inquire into the result of the Alabama trial; held that a party cannot properly seek review of an alleged error which the party invited, and by allowing its expert to mention the accident, petitioner invited any error which might have occurred); *Int'l Raceway, Inc. v. JDFJ Corp.*, 97 Wn. App. 1, 9-10, 970 P.2d 343 (Div. I, 1999) (JDFJ Corp., the lessor of property to International Raceway, argued on appeal that the trial court should not have reduced the damages awarded it by the amount spent by its lessee on removing timber and grading a parking lot on the property, however, JDFJ argued in the trial court that stumpage value is the sales price of the timber less the costs of tree removal, and the court took the timber sales price less the costs of tree removal in awarding damages; the

trial court's actions were in accord with JDFJ's request, and citing *Graham*, held that a party may not complain on appeal of error for which he is responsible or of rulings which he has invited the trial court to make); *Bellevue v. Kravik*, 69 Wn. App. 735, 738-40, 850 P.2d 559 (Div. I, 1993) (invited error precluded the City of Bellevue from arguing on appeal that evidence of improper motive in manipulating zoning to depress property values should have been excluded at trial – it resisted a motion by property owners to exclude evidence on the City's comprehensive plan review process arguing that evidence of the review process was necessary to show that the process was fair and that it had acted reasonably; the trial court denied the motion, however, Bellevue opened the door to the admission of evidence of its review process and invited any error in admitting that evidence); *Willapa Trading Co., Inc. v. Muscanto, Inc.*, 45 Wn. App. 779, 786-87, 727 P.2d 687 (Div. I, 1986) (Willapa Trading argued that it was an abuse of discretion for the trial court to permit Wheeldon, its president, director, and sole stockholder, to act as its attorney at trial in the case, however, the record reflects that Wheeldon sought permission from the court to appear for himself and his wholly owned corporation, and if granting the permission was error, it was invited error which he cannot now use to gain relief on appeal).

This array of Washington cases represents a broad cross-section of cases in which invited error has been applied in appeals to preclude judicial review of alleged errors in rulings which a party invited or induced the trial court to commit, and did not object to below. They are summarized to show that invited error simply does not apply as a basis for precluding by estoppel or waiver the constitutional arguments on the absence of a record of trial proceedings in an arbitration as grounds for vacating the proceedings under RCW 7.04.160 for an error of law.

Under Washington law, estoppel is not favored and a party asserting estoppel must prove its elements by clear,

cogent and convincing evidence. See *Berschauer/Phillips v. Seattle Sch. Dist.*, 124 Wn.2d 816, 831-32, 881 P.2d 986 (1994) (plaintiff is not estopped from bringing an assigned contract claim against the defendants – praise of a party's work and statements that a party does not intend to file a lawsuit against another party do not alone or in combination equal an affirmative promise not to sue); *Colonial Imports v. Carlton Northwest*, 121 Wn.2d 726, 734-36, 853 P.2d 913 (1993) (estoppel has the effect of precluding a party from offering an explanation or defense that it would otherwise be able to assert; the law does not encourage this silence, and so demands from the party asserting estoppel the highest possible burden of persuasion).

Waiver, on the other hand, is the intentional and voluntary relinquishment of a known right, *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998). Waiver will not be inferred from doubtful or ambiguous factors, and must be established by unequivocal acts or conduct evidencing an intent to waive. *Hadaller v. Port of Chehalis*, 97 Wn. App. 750, 757, 986 P.2d 836 (Div. II, 1999).

There are simply no facts which raise an estoppel or a waiver by petitioner to object on appeal to the absence of a record. The record is empty of any positions, actions or statements by petitioner in the trial of this case that are inconsistent with arguments or positions taken on appeal, and there are no arbitrator actions in the proceedings that can be pointed to in reliance on prior positions or statements by petitioner as reflected in trial rulings and orders. See *Graham*, 41 Wn.2d at 851; *Colonial Imports*, 121 Wn.2d at 734-35. There also are no actions or conduct by petitioner or her counsel showing an intentional and voluntary relinquishment of rights to a record of proceedings. See *Jones*, 134 Wn.2d at 241-42. There were no rulings on this issue at trial, and the record is barren of any evidence showing an estoppel or waiver of rights to make these arguments on appeal in this case. It is significant

that this argument was rejected on a motion by Mutual of Enumclaw to dismiss the appeal below, and that it is not mentioned in the opinion. The weakness of the argument, which is the same here as it made below, is highlighted by these facts, and on any close scrutiny, disintegrates as a theory in the appeal. It is patently clear that the principle has no application in this case.

B. THE DECISION OF THE STATE COURTS IS IN CONFLICT WITH THE REASONING OF THIS COURT'S DUE PROCESS AND EQUAL PROTECTION CASES.

In its brief, Mutual of Enumclaw argues that "plaintiff's constitutional challenges are frivolous," and in support of this statement, offers the misty argument that the cases cited in the petition stand for the position that criminal defendants are entitled to have court proceedings recorded, that those considerations do not apply to an arbitration agreement, and "no case says otherwise." (Br. in Opp. 8). In particular, it fails to discuss any of the sources cited in the petition, and it may also be added that this argument is so manifestly untenable as to require little discussion beyond what has already been stated.

1) Due Process. Mutual of Enumclaw does not (and plainly could not) refute the consequential importance of state appellate decisions on this issue in the *Dependency of Grove, Parkridge, Barrie, Larson,* and *Woods* cases which have integrated the principles of *Boddie, Draper* and *Griffin* into state law in criminal and civil cases. As explained in the petition, this case is a reflection of *Griffin's* principle that a State denies a constitutional right guaranteed by the Fourteenth Amendment if it allows persons with means in criminal cases to have appellate review except those who cannot pay for the records of their trials. As in *Griffin,* where the Court noted that

appellate review had become an integral part of the Illinois trial system for adjudicating the guilt or innocence of a defendant, 351 U.S., at 18, review by appeal in Washington has become a basic part of the system in criminal and civil cases, and is guaranteed by statute under state law (RCW 7.04.220). (Petition, pgs., 22-23). Once a State provides that right, said the Court in *Griffin*, it may not "bolt the door to equal justice," 351 U.S. at 24 (Frankfurter, J., concurring).

The emphasis in *Boddie* that "the rationale of *Griffin* covers this case," envisions that, consistent with *Griffin*, appellants with means, even if limited, cannot be denied a record of sufficient completeness to permit proper consideration of their appeals, and a complete judicial review to which they are entitled as a matter of due process. However evident the value of *Boddie's* holding as a safeguard against tyranny, in its example that due process "requires . . . a meaningful opportunity to be heard," 401 U.S., at 377, its value in this case is unmistakable.

The purpose of the Due Process Clause is to prevent arbitrary deprivations of liberty or property. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434 (1994). As in that case, the safeguards of judicial review in appeal proceedings through protections which state law provides against arbitrary deprivations of property, are removed by state court rulings which eliminate the right to a record for purposes of appeal when that right is provided for under state law, and under this Court's decisions in the *M.L.B.*, *Boddie*, *Mayer*, and *Griffin* cases. Established safeguards provided for under state and federal law have been removed in this case, and the denial of these protections violates the Due Process Clause of the Fourteenth Amendment.

2) Equal Protection. The basic submission on this issue is that as in *Lindsey*, where the double-bond requirement was found to heavily burden the statutory right to appeal, the interpretation of the statute, which nullifies the importance of and effectively denies a record to a party in appeal proceedings under the statute, heavily

burdens the right to appeal under RCW 7.04.220. The interpretation does not rationally advance the purposes of the statute (avoiding the formality, expense, and delay of the court system) because the statutory scheme clearly contemplates that parties may apply to the courts to confirm, vacate, or modify an award, and decisions interpreting the statute state that there are cases where the courts must review the evidence to determine whether the grounds for vacating an award are present, to ascertain the law on disputed issues, and where a record is necessary to discern whether there are errors of law in rulings that affect the award. (Petition, pgs. 21-22, and 29).

It should also be added that as in *Logan*, terminating potentially meritorious appeals in a random manner without a record, as in this case, on the rationale that a record is not required when a court reviews proceedings under RCW 7.04, and that the lack of a recorded transcript is irrelevant in these proceedings, when appeals under the statute are clearly considered and decided with such records, does not further these purposes, and is not rationally related to these ends. (Petition, pgs. 29-30).

The interpretation of the statute in this manner, which necessarily has the effect of dividing persons appealing under the statute into two distinct groups that are accorded very different treatment, is an arbitrary classification and a denial of equal protection.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 29, 2002

No. 01-809

In The

Supreme Court of the United States

LEAH E. MCKENZIE,

Petitioner,

v.

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Washington

APPENDIX TO REPLY BRIEF

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

LEAH E. McKENZIE, Appellant, v. MUTUAL OF ENUMCLAW INSURANCE COMPANY, Respondent.	No. 45634-2-I COMMISSIONER'S RULING DENYING MOTION ON THE MERITS

A motion on the merits to affirm was filed in this case under RAP 18.14(a). Reviewing the issues in light of *State v. Rolax*, 104 Wn.2d 129, 702 P.2d 1185 (1985), it appears that this case does not meet the criteria set out in RAP 18.14(e)(1). Accordingly, the motion should be denied. It further appears the case should be referred to a panel of judges for consideration without oral argument under RAP 11.6.

Now, therefore, it is hereby

ORDERED that the motion on the merits to affirm is denied. And, it is further

ORDERED that this case is referred to the next available judges' non-oral argument calendar. RAP 11.6.

Done this 12th day of September, 2000.

/s/ James R. Verellen
Court Commissioner